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In the Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE*, NATIONAL ASSOCIATION OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the pretrial restraint of forfeitable substitute assets allegedly needed to retain counsel of choice violates the Fifth or Sixth Amendments?

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INTEREST OF AMICI CURIAE[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amici curiae certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The issue presented in this case involves the constitutionality of laws that permit forfeiture of substitute assets. Amici's interest in this issue stems from the involvement of many state and local

governmental entities in law enforcement including under state statutes providing for the forfeiture of substitute assets. Amici have identified numerous forfeiture laws which would be overturned by a ruling in favor of Petitioner Luis in this case.

State legislatures have enacted forfeiture laws to deter those engaged in criminal enterprises such as health care fraud, drug dealing, money laundering, theft related to motor vehicles, racketeering, tax evasion, smuggling, and other crimes. This achieves the purpose of deterrence since criminals understand that regardless of their punishment, they must forfeit the assets they acquire through their criminal enterprise. Like the statute at issue in *Luis v. United States*, forfeiture laws, which are primarily a creature of statute, were enacted by state and local legislatures to deal with highly sophisticated criminals engaged in complex and well-funded criminal enterprises. Forfeiture furthers the important governmental purpose of assuring that forfeitable assets are available at the conclusion of the trial, and are not hidden or dissipated. Forfeiture helps to ensure that those involved in criminal enterprises do not retain the benefits of their illicit conduct. Many states consider forfeiture to be a vitally important tool in deterring criminal activity and providing for reparation of the victims injured by the criminal conduct.

SUMMARY OF THE ARGUMENT

Petitioner seeks a broad constitutional ruling from this Court reversing the Eleventh Circuit decision and holding that the injunction prohibiting her from using assets violates the Sixth Amendment, is not authorized under a proper interpretation of 18 U.S.C. § 1345, and

was not issued using procedural safeguards adequate to satisfy Due Process. A ruling in favor of the Petitioner will result in a massive unwarranted preemption of validly-enacted state laws and would create an artificial distinction in the law between directly forfeitable property and substitute assets which can be forfeited when directly forfeitable assets are hidden or can't be reached by the jurisdiction. This would be particularly problematic because the state and local governments, with their varied forfeiture systems, provide a laboratory of options that can be used to fight increasingly sophisticated and often international criminal enterprises.

A broad constitutionally-based rule threatens to render these varied laws unconstitutional in whole or in part. Moreover, the Court's decision may impede efforts to consider various potential reforms to forfeiture by substituting a single-constitutionally-based rule. *Federal Asset Forfeiture: Uses and Reforms, Hearing,* February 11, 2015, p. 26 (describing efforts by four national law enforcement organizations, the Major Cities Chiefs Association (MCCA), Major County Sheriffs' Association (MCSA), International Association of Chiefs of Police (IACP), and the National Sheriffs' Association (NSA), to propose reforms to the current Attorney General).

Substitute assets are often made subject to forfeiture where a criminal has engaged in efforts at money laundering or hiding assets by commingling them with other money or hiding them in accounts outside the jurisdiction or other steps aimed at protecting them from being seized by the government as part of a criminal prosecution. Treating substitute

assets differently for constitutional purposes poses both practical and legal problems. It would impede state and local law enforcement efforts. And it would make efforts to obtain assets for compensation of victims or restitution much more difficult.

Probable cause provides a sufficient standard to safeguard the rights of those whose property is seized. As this Court has recognized, probable cause is sufficient to deprive persons of a liberty interest; certainly, it is therefore a sufficient standard to deprive someone of a property interest.

ARGUMENT

Striking Down 18 U.S.C. § 1345 On Constitutional Grounds Threatens To Overturn Numerous State And Local Forfeiture Laws, Undermine Law Enforcement Efforts Directed At Sophisticated Criminal Enterprises, And Elevate The Rights Of Those With Forfeitable Assets Above Rights Available To Other Criminal Defendants

A. State and local governments enact forfeiture laws as an important tool to fight sophisticated criminal enterprises and deprive criminals of their illicit gains

State asset forfeiture laws serve dual noble goals – to make victims of crime as whole as possible and to thwart criminals from profiting from their crimes. Sophisticated criminals today commingle funds particularly when involved in money laundering transactions. See e.g, *States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998); *United States v. Trost*, 152 F.3d 715

(7th Cir. 1998). The goal of forfeiture programs is first and foremost to deprive these criminals of the proceeds of their crimes, to disrupt and put an end to organized criminal syndicates and drug cartels, which use the proceeds of their criminal enterprises to continue their illegal activities, and to recover property that can be used to compensate victims and deter crime. This Court has recognized the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631; 109 S. Ct. 2646; 105 L. Ed. 2d 528 (1989).

Congress recently considered the enormous benefits to the public that stem from forfeiture efforts, and heard compelling testimony from the U.S. Department of Justice, state prosecuting attorneys, and others. One prosecutor explained that "[a]sset forfeiture is a tool used by state and local law enforcement and prosecutors to go after the pocketbooks of drug dealers and drug traffickers." *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 24 (Testimony of Keith A. Henderson, Prosecuting Attorney, Floyd County, Indiana). He cautioned that "[n]ot having the ability, or reducing the ability to go after criminal proceeds ignores a huge component of sophisticated, modern transnational organized crime, particularly when it comes to money laundering operations." *Id.*

Well-financed and sophisticated drug cartels or criminal enterprises engaged in conspiracies to defraud the state or federal government in areas such as health care are not entitled to keep the fruits of their illegal conduct. A representative of the Department of Justice explained that "in my district, in Miami, when I was

both a State and Federal prosecutor, it wasn't that unusual to open the trunk of a car and find $50,000 to $100,000 of which no one knew who owned that money." *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 93 (Testimony of Kenneth A. Blanco, Deputy Ass't Attorney General, United States Justice Dep't). In his view, forfeitures have been instrumental in handicapping the Zeta Cartel, for example, by making it "very difficult for their gatekeepers on the border to continue" because, without forfeited assets, the Cartel found it difficult to pay their people. *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 93 (Testimony of Kenneth A. Blanco, Deputy Ass't Attorney General, United States Justice Dep't). Drug cartels and other highly sophisticated criminal enterprises work hard to hide assets, to commingle them so that they are untraceable, or to send them overseas where they are difficult to reach. See generally, Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, http:///scholarship.law.berkley.Edu/bjil/vol22/iss1/5, p. 99; HSBC admits failings after helping criminals hide assets, http://www.today/online.com/print/ 1056406. Adopting a rule to protect a criminal defendant's ability to access forfeited assets to pay for a criminal defense or any other purpose runs against the long history and tradition of forfeiture.

Removing the proceeds of crime from criminal enterprises is not only an appropriate deterrent, it enhances public security by disrupting criminal organizations that would otherwise continue to function. *Professional dealers are as astute as the*

prosecutors and lawyers. http://www.bucyrustelegraphforum.com/story/news/local/in-depth/2014/10/18/drug-dealers-know-laws-... Drug dealers take precautions to hide money – opening bank accounts in others' names to hold their drug sale earnings. *Id.* This makes the enforcement of forfeiture laws limited to assets directly traceable to criminal activity much more difficult to enforce. Hiding assets internationally is an unfortunate but real aspect of criminal conduct today. Recently, a Swiss bank was ordered to forfeit $15 million in a U.S. tax case after it had allegedly helped wealthy Americans hide millions of dollars in secret accounts abroad. Chad Bray, *Swiss Bank Ordered to Forfeit $16 Million in U.S. Tax Case*, The Wall Street Journal, April 24, 2012, http://www.wsj.com/articles/SB. Congressional findings specifically note that "smuggling currency in the form of 'bulk cash' is a favored device of drug traffickers, money launderers, tax evaders, and persons financing terrorist operations, and that it 'is the equivalent of, and creates the same harm as, the smuggling of goods.'" Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 Buff. Crim. L. Rev. 583, 606 (2004) quoting "Findings" included as section 371 of Pub. L. No. 107-56, 115 Stat. 272, 337 (2001).

Alabama's statute exemplifies the provisions allowing forfeiture for substitute assets when the assets traceable to the crime have been deliberately hidden or commingled or moved outside the jurisdiction. The statute provides for the forfeiture of "any property owned or possessed by a person" when property that is subject to forfeiture "(1) cannot be located upon the exercise of due diligence, (2) has been

transferred or sold to, or deposited with, a third party, (3) has been placed beyond the jurisdiction of the court, (4) has been substantially diminished in value or, (5) has been commingled with other property which cannot be divided without difficulty, and such person knowingly participated as a principal, aider and abettor, or conspirator in the acts subjecting the property to forfeiture...." Ala. Code § 13A-12-200.8(f).

Similarly, Florida's statute makes contraband any personal property, including money or securities, "in the possession of or belonging to any person who takes aquaculture products in violation of s.812.014(2)(c)." Fla. Stat. Ann. § 932.701(2009). Florida also specifically allows forfeiture "up to the value of any property subject to foreclosure" if it "(a) Cannot be located; (b) Has been transferred to, sold to, or deposited with, a third party; (c) Has been placed beyond the jurisdiction of the court; (d) Has been substantially diminished in value by any act or omission of the person in possession of the property; or (e) Has been commingled with any property which cannot be divided without difficulty." *Id.* at (5).

As these statutes clearly show, the state intent is to address criminal activity perpetrated on innocent victims by requiring offenders to assist in making those victims whole through asset forfeiture. Where offenders try to hide the profits of their illicit activities such that those assets cannot be found, states have enacted laws to assist victims in becoming whole by permitting forfeiture for substitute assets.

Establishing a broad constitutional rule will have the deleterious effect of inhibiting the states from protecting their citizens from sophisticated criminal

activity where fruits of the crimes are hidden or missing. It will also quash state efforts to create sound policies and regulations surrounding asset forfeiture. See generally, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, __ U.S. ___, 135 S. Ct. 2652, 2673; 192 L. Ed. 2d 704 (2015) (recognizing need to defer to states so that they may perform their role as laboratories for finding solutions to pressing legal problems). The "statutory language in state forfeiture laws varies widely across the country." *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 25. The Center for Problem-Oriented Policing said that "there are literally hundreds of federal and state forfeiture laws, and such laws continue to be enacted at near record levels." *Asset Forfeiture: Response Guide No. 7*, John L. Worrall (2008).

By grounding its decision on non-constitutional grounds, or adopting a narrow constitutional rule, the Court protects this sphere of state and local decision-making from being eroded by a constitutionally-based rule or series of rules that will usurp the ability of the state and local governments to adopt forfeiture programs that meet their unique needs. To be sure, deference to state and local governments cannot block enforcement of constitutional rights. But deference to just such legislative efforts has long been a hallmark of our federalism and should be appropriately part of the decision-making in this case.

B. No justification exists for treating substitute assets that are subject to forfeiture differently than other assets

Contrary to Petitioner's argument, it makes no practical or legal sense to treat substitute assets differently than other forfeitable assets. Substitute assets may be subject to forfeiture under federal and state laws. State and local legislatures have enacted various provisions designed to prevent criminals from evading the forfeiture law by converting or commingling assets in a way that makes it hard to trace or by hiding assets or by shipping them outside the jurisdiction. Legislation providing for forfeiture of so-called untainted assets is intended to aid in law enforcement, to deprive criminal enterprises of the funds they need to continue, and to gain possession of funds or property that can be used to compensate the victims of crime.

Making a distinction that is not found in the statute will undermine the legislative structure for enforcing the laws. *United States v. McGauley*, 279 F.3d 62, 71 (2nd Cir. 2002) is illustrative of situations in which the key distinction in the law may not rest on whether the specific funds were traceable to the fraudulent conduct. In *McGauley*, the Second Circuit held that commingled funds are subject to forfeiture when tainted funds are commingled with "legitimate funds" because commingling of them is enough "if the commingling was done for the purpose of concealing the nature or source of the tainted funds (that is, if commingling was done to facilitate money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i))." A judicial decision distinguishing between the source of the funds will

undermine this legislative effort to prevent money laundering.

Moreover, a judicial distinction based on the source of the funds will hamper law enforcement on a practical level. News accounts reveal concerns from those engaged in law enforcement over the difficulties that can arise in trying to enforce the laws, including forfeiture laws, against increasingly sophisticated criminal enterprises and the practical need for forfeiture of substitute or non-tainted assets. Unlike the pickpocket on the street or the person engaged in petty theft, drug dealers may open a bank account in other people's names to hold their drug sale earnings or keep a sports car in someone else's name and then use a rental car for the criminal conduct, all to avoid forfeiture. *Drug Dealers know laws, work around them*, Kristina Smith, October 18, 2014, http://bucyrustelegraphforum.com/story/news/local/in-depth/2014. Criminals may hide assets off-shore using code names and numbers. Chad Bray, *Swiss Bank Ordered to Forfeit $16 Million in U.S. Tax Case*, *supra*.

Sophisticated criminals know about the forfeiture laws; if the distinction proposed here is adopted, they will simply commingle or dissipate stolen or illegally-gotten gains so that they can retain the use of other funds when the government seeks to obtain restitution for funds they obtained by fraud or embezzlement or other illegal conduct. See generally, Cassella, *Bulk Cash*, *supra*. The funds circulating as part of this money laundering provide enormous gains to criminal enterprises. Dan Olson, *Hiding a 'mountain of cash'*, Minnesota Public Radio, http://www.news.minnesota.publicradio.ord/features/200107/03_olsond

_moneylaundering/. And the failure to freeze them would allow them to be dissipated or hidden. Thus, the distinction is properly rejected.

C. Allowing the freezing of substitute assets after a finding of probable cause provides the appropriate standard to protect the rights of those with assets potentially subject to forfeiture while also ensuring that they remain available

The constitutional right to counsel is not violated by the denial of access to assets that are subject to foreclosure under federal or state law as long as there is probable cause to believe that the seized assets are subject to forfeiture. This Court has concluded that property (forfeitable assets) may be seized upon a finding of probable cause in three separate decisions. *Kaley v. United States*, __ U.S. ___, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989).

Despite the factual assertion that a defendant will sometimes be unable to retain the attorney of his choice without using assets that have been frozen because they are subject to forfeiture, no constitutional violation occurs if the assets are frozen based on a finding of probable cause. 491 U.S. at 615; 109 S. Ct. 2657. It is well-settled that the government may restrain persons based on a finding of probable cause to believe that they have committed a serious offense. 491 U.S. at 615-616; 109 S. Ct. 2657. It logically follows that "[i]f the Government may, post-trial, forbid use of forfeited assets to pay an attorney, then surely no

constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Id.* The probable cause finding of a grand jury is sufficient to restrain a criminal defendant for trial or place her in custody; it should work in the same way for purposes of freezing property. *Kaley*, 134 S. Ct. at 1098-1099; 188 L. Ed. 2d 46. In other words, the probable cause finding that allows the government to put a defendant on trial or place him in custody is sufficient to allow for the seizure or freezing of forfeitable assets. *Id.* at 1100; 188 L. Ed. 2d 46. That reasoning controls here as well and supports a ruling upholding the government's position.

CONCLUSION

For the foregoing reasons, the Court should squarely reject Petitioner's argument that the seizure of forfeitable assets violates the Constitution regardless of whether it means that the defendant will be unable to retain the lawyer of his or her choice so long as there has been a probable cause finding.

Respectfully submitted,

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